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No. 92-780

FILED
DEC 18 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, et al.,

Petitioners,

v.

JOSEPH SCHEIDLER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF RESPONDENTS JOHN P. RYAN AND PRO-LIFE DIRECT ACTION LEAGUE, INC. IN OPPOSITION TO THE PETITION FOR CERTIORARI

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December 23, 1992

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts properly refused to expand the Sherman Act to apply to the totally non-commercial "conspiracy" of pro-life demonstrators alleged in this case.

2. Whether, even if the Sherman Act did apply, the petitioners' antitrust claims were properly dismissed because the petitioners failed to allege any antitrust injury.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The petitioners have accurately listed the parties to this proceeding.

The Pro-Life Direct Action League, Inc. has no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATEMENT OF THE CASE	2
I. Nature Of The Case	2
II. The Proceedings And Their Disposition in the Courts Below	2
III. The Facts	3
A. Background	3
B. The Complaint	4
REASONS FOR DENYING THE WRIT	6
I. Petitioners Misstate The Issue and The Facts	6
A. Petitioners Misstate The Issue Before The Court	6
B. Petitioners Also Misstate The Facts, Including Their Own Allegations	9
II. The Court Should Deny The Writ Because The Law On the Key Issue Before It Is Well Established—The Antitrust Laws Do Not Apply To A Non-Commercial "Conspiracy" Such As The One Alleged By The Petitioners In This Case	12

TABLE OF CONTENTS—Continued

Page

A. Plaintiffs Allege Multiple State Law Torts And Violations Of State And Local Ordinances But No Recognized Violation Of Section 1 Of The Sherman Act 12

B. The Legislative History Of The Sherman Act, As Well As Every Supreme Court And Court Of Appeals Decision On Point, Recognize That The Antitrust Laws Do Not Apply To A Non-Commercial Case Such As This 15

C. The Cases Relied Upon By Petitioners Do Not Support The Applicability Of The Antitrust Laws To This Case 19

D. NOW Itself Has Recognized That This Sort Of Attempt To Expand The Antitrust Laws Does Not Merit This Court's Attention 23

E. The Expansion Of The Sherman Act Urged by Petitioners Would Have Absurd Results 25

III. The Court Should Deny The Petition Because, Even If The Sherman Act Applied In This Case, Petitioners Do Not Allege Any Antitrust Injury 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: Page

Allied International, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982) 17, 18
Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 19, 20, 25
American Tobacco Co. v. United States, 328 U.S. 781 (1946) 15
Apex Hosiery Co. v. Leader, 310 U.S. 469 (1939) 14, 15, 18, 19
Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325, *reh'g denied, en banc*, 788 F.2d 1223 (7th Cir. 1986) 28
Barr v. National Right to Life Committee, 1981-2 Trade Cases ¶64,315 (M.D. Fla. 1981) 17, 19
Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) ... 27
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 27
Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 27
Costello Publishing Co. v. Rotelle, 670 F.2d 1035 (D.C. Cir. 1981) 21
Council on Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920) 22
Council for Employment & Economic Energy Use v. WHDH Corp., 580 F.2d 9 (10th Cir. 1987), *cert. denied*, 440 U.S. 945 (1979) 18
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, *reh'd denied*, 365 U.S. 875 (1961) 12, 13, 14, 16
F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 21
F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) 19, 20

TABLE OF AUTHORITIES—Continued

	Page
Franklin Music Company v. American Broadcasting Companies, Inc., 616 F.2d 528 (3d Cir. 1979)	15
Goldfarb v. Virginia State Bar, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975)	21
Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)	14
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	16
Kruezer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984)	20
Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970)	16, 17
Missouri v. National Organization for Women, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980)	16, 21, 22, 23, 24, 25, 26
NAACP v. Claiborne Hardware Company, 458 U.S. 886, *reh'g denied*, 459 U.S. 898 (1982)	20
National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85 (1984)	20, 21
National Organization for Women v. Scheidler, 765 F.Supp. 937 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992)	2, 7
National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992)	2, 7, 8, 9
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)	20
Northeast Women's Center, Inc. v. McMonagle, 624 F.Supp. 736 (E.D. Pa. 1985)	22
Northeast Women's Center, Inc. v. McMonagle, 670 F.Supp. 1300 (E.D. Pa. 1987), *aff'd in part, rev'd in part*, 868 F.2d 1342 (3d Cir. 1989)	22, 23
Parker v. Brown, 317 U.S. 341 (1943)	16

TABLE OF AUTHORITIES—Continued

	Page
Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, 672 F.2d 1280 (7th Cir. 1982)	27, 28
Proctor v. General Conference of Seventh-Day Adventists, 651 F.Supp. 1505 (N.D. Ill. 1986)	17
Seglin v. Esau, 769 F.2d 1274 (7th Cir. 1985)	15, 27
Sitkin Smelting & Refining Co. v. FMC Corporation, 575 F.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978)	15
Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648 (7th Cir. 1984)	14, 15, 28
Swan v. First Church of Christ, Scientist, 225 F.2d 745 (9th Cir. 1955)	17
Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961)	27
United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1921)	14
Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982)	28
Wilk v. American Medical Association, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984)	21

STATUTES:

15 U.S.C. §1	2
15 U.S.C. § 15	25
15 U.S.C. §26	2

OTHER AUTHORITIES:

21 Cong. Rec. 2562 (1890)	16

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Respondents John P. Ryan ("Ryan") and the Pro-Life Direct Action League, Inc. ("PDAL") respectfully ask the Court to deny the Petition for Writ of Certiorari (the "Petition").

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit affirming the district court's dismissal of this suit

is reported at 968 F.2d 612 (7th Cir. 1992) and is reproduced in Appendix A to the Petition.

The opinion of the District Court for the Northern District of Illinois dismissing this suit is reported at 765 F.Supp. 937 (N.D. Ill. 1991) and is reproduced in Appendix B to the Petition.

STATEMENT OF JURISDICTION

Petitioners have accurately stated the basis for this Court's jurisdiction over this proceeding.

STATEMENT OF THE CASE

I. Nature Of The Case

The petitioners (sometimes referred to in this brief as the "plaintiffs") seek a declaratory judgment, injunctive relief and treble damages against Ryan and PDAL under Section 1 of the Sherman Act (15 U.S.C. §1) and Section 16 of the Clayton Act (15 U.S.C. §26). Ryan and PDAL are not named as defendants in plaintiffs' RICO and common law counts.

II. The Proceedings And Their Disposition In The Courts Below

This case was initiated in 1986 by the filing of a single-count antitrust complaint. After several amendments to the complaint adding new counts and new defendants, and replacing one plaintiff clinic with another, certain of the respondents (often referred to in this brief as the "defendants") moved to dismiss the plaintiffs' second amended complaint (the "Complaint") (R.331). Their motion was based primarily on the Complaint's failure to state a claim under the antitrust laws and RICO (R.331). District Court Judge James F. Holderman granted that motion and dismissed the action "in its entirety" (R.502).

The plaintiffs subsequently appealed the district court's order dismissing the case (R.517). On June 29, 1992, the Court of Appeals for the Seventh Circuit affirmed the district court's order. Petitioners sought a rehearing *en banc* and the court of appeals denied that request. Petitioners subsequently filed their petition for writ of certiorari with this Court.

III. The Facts[1]

A. Background

Ryan is a Missouri resident who, until 1987, was engaged in a number of pro-life activities, mostly in the St. Louis, Missouri area (R.329, ¶4). PDAL is a Missouri not-for-profit corporation which has also been engaged in pro-life activities (R.21, ¶3). Until 1987, Ryan was executive director of PDAL (R.21, ¶1; R.329, ¶4; R.236, ¶10). He has not been involved as a pro-life activist since then (*Id.*).

Neither PDAL nor Ryan, as its executive director, has been engaged in commerce or owned an interest in any business entity (R.21, ¶¶5 and 6). Nor has either had any commercial relationship with any of the plaintiffs or with any women's health center that provides abortions. Neither has ever provided abortions or gynecological services of any kind (*Id.*, ¶¶6 and 7).

Neither Ryan nor PDAL has been involved in any demonstration, picketing, sit-in or other pro-life activity at, or in the vicinity of, either of the two plaintiff clinics (R.329, Ryan Aff., ¶5 and O'Brien Aff., ¶5). Nor has Ryan or PDAL even been in the vicinity of those clinics or

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[1]Petitioners' Complaint was dismissed by the district court. Accordingly, the well pled allegations contained in it are accepted as true—even though respondents vehemently deny most of those allegations, especially those which allege that respondents engaged in violence of any kind.

planned or taken (or participated in any plan to take) any action of any kind against them (*Id.*).

B. The Complaint

The Complaint contains numerous conclusory allegations about a vague "conspiracy" by "the defendants" to "drive every clinic in the United States, *such as* [the plaintiff clinics], out of business" (R.236, ¶¶26 and 27) (emphasis added). (*See also*, R.236, ¶¶1, 2, 30, 32, 33 and 39-41.) But the petitioners do not allege that either Ryan or PDAL was ever involved in any demonstration, picketing, sit-in or other pro-life activity at, or in the vicinity of, either of the two plaintiff clinics—or that Ryan or PDAL has ever even been in the vicinity of those clinics. Nor do plaintiffs allege that either Ryan or PDAL has ever planned, participated in planning, or taken, any action of any kind with respect to either of the two plaintiff clinics. In fact, plaintiffs' Complaint contains no such allegations against *any defendant* except Scheidler, who on one occasion in 1986, allegedly entered one of the plaintiff clinics (R.236, ¶¶43-46). Plaintiffs do not allege that any other defendant participated in that event.[2]

Petitioners also rely on their "RICO Case Statement" (R.469) to establish the adequacy of their claims.[3] That Statement stated that the conspiracy alleged by the plaintiffs involved "hundreds of thousands of unidentified

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[2]Ryan and PDAL have admitted that they have engaged in sit-ins at *other* clinics. *However, they have denied that they have engaged in violence of any kind* (R.444, ¶2). To the extent that the court of appeals referred to the defendants' activities as "reprehensible" (*see* Petition at p.3 n.1 and p. A-17), it based its conclusion on the plaintiffs' *allegations*, not upon any proven facts.

[3]Even if the plaintiffs could properly rely on their RICO Case Statement to establish their claims against other defendants, that statement cannot be used to support their claims against Ryan and PDAL since neither Ryan nor PDAL is a RICO defendant.

co-conspirators" (R.469, ¶3, p.3), and contained an exhibit which described pro-life activities in which Ryan and PDAL were alleged to have participated (*Id.*, Ex. B). Not one of those activities is alleged to have taken place in the vicinity of, or to have affected, either of the plaintiff abortion clinics.

Petitioners conclude that the activities of "the defendants" have "restrain[ed] interstate trade" and have had "an anticompetitive effect" (R.236, ¶¶81-82). But their Complaint does not define any relevant product or geographic markets in which they (or any other women's health centers) were allegedly less able to compete. Nor do the petitioners allege that Ryan or PDAL engaged in commerce, had any interest in any business entity, or competed with any petitioner. (Petitioners allege only that the "business" of PDAL consists of "disrupting and closing clinics" (R.236, ¶18).)

In fact, petitioners do not allege that Ryan or PDAL ever had *any* commercial relationship with the petitioners or any abortion clinic. Although they did allege that the "defendants and their co-conspirators" established "competing pregnancy testing and counseling facilities..., homes for pregnant women..., and prenatal and delivery services, foster homes and private adoption agencies" (R.236, ¶2), they did not allege that any of those facilities competed with the *plaintiff* clinics. And, although they allege that defendant Terry operated pregnancy and counseling centers in New York and defendant Wojnar operated anti-abortion women's medical clinics in Chicago (R.236, ¶¶11 and 13), they make no such allegations about Ryan, PDAL or any other defendant and they allege no such activities by *any* defendant in Delaware or Wisconsin. Of course, plaintiffs do not allege that Ryan, PDAL or any other defendant has ever provided abortion services.

Likewise, petitioners do not allege in their Complaint that Ryan, PDAL or any other defendant engaged in any pro-life activities for business or commercial gain. Nor do they allege that Ryan, PDAL or any other pro-life defendant used any business or commercial means to accomplish their objectives. They are not alleged to have engaged in any price-fixing, boycott, concerted refusal to deal, territorial restraint or other recognized antitrust violation.

Finally, petitioners do not allege that Ryan, PDAL or any other pro-life defendant had "market power" or the ability to substantially affect the supply of, or demand for, abortion services in any relevant market—or even that respondents participated in the market for abortion services. Nor do they allege that the activities of Ryan or PDAL, or their alleged "co-conspirators," reduced the number of abortion clinics (or the number of abortions performed by abortion clinics) in Wisconsin, Delaware or elsewhere in the United States, or otherwise substantially reduced competition between abortion clinics or between abortion clinics and other providers of abortion services.

REASONS FOR DENYING THE WRIT

I. Petitioners Misstate The Issue And The Facts

A. Petitioners Misstate The Issue Before the Court

Petitioners contend that the issue in this case is "whether the Sherman Act contains an implied exemption for all organizations that claim to be espousing a 'social cause'...." (Petition at p.i.) Later, petitioners phrase the issue in terms of whether "good motives" are a defense under the Sherman Act (Petition at pp. 13 *et seq.*). However phrased, this is not the issue.

Respondents have never argued, and do not argue now, that "good motives" or a "social cause" create an *exemption* from the antitrust laws. The issue is whether the antitrust laws apply here in the first instance, not whether some "exemption" applies. As the district court stated: *The "threshold question is whether the Sherman Act was intended to cover the conduct alleged here." National Organization for Women v. Scheidler*, 765 F.Supp. 937, 939 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992) (Petition at p.B-3) (emphasis added). This is also the issue on which the court of appeals focused.[4]

Petitioners also misstate the issue when they suggest that the "exemption" they claim is espoused by respondents (and the two lower courts) was based on "good motives" or a "social cause." The issue is not just whether the respondents have good motives or a social cause. Rather, it is whether the antitrust laws apply to a conspiracy which is non-commercial *in every respect*. As the court of appeals held in this case:

> The [Supreme] Court explained in *Apex Hosiery*, 310 U.S. [469,] 493 n.15 [1939], that "[t]he history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the act was designed to prevent restraints on trade which had a significant effect on

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[4]Throughout their Petition, petitioners egregiously mischaracterize the decision of the court of appeals. That court did not find any exemption based on good motives. Rather, it examined the legislative history of the Sherman Act and properly concluded that that law was not intended to apply in a non-commercial case such as this. Petitioners' misstatement of the issue is highlighted by their argument that, if respondents do not want to be covered by the antitrust laws, they should go to Congress for a legislative exemption (Petition at p.28). There is, of course, no reason to ask Congress for an exemption from a law which does not apply in the first place.

> such competition." For this reason, we question the appropriateness of the Act's application in this case.

National Organization for Women v. Scheidler, 968 F.2d 612, 617 (7th Cir. 1992), Petition at p. A-8. *See also*, 968 F.2d at 622, Petition at p. A-17 ("The defendants' acts are far beyond those that Congress intended to reach with the Sherman Act").

The Seventh Circuit again emphasized the limits of the antitrust laws when it stated:

> We are convinced by the economic and legislative history of the Sherman Act that it was intended to prevent *business competitors* from making restraining arrangements *for their own economic advantage.* As the [Supreme] Court stated in *Allen Bradley Co. v. Union*, 325 U.S. 797, 811 (1945), "We know that Congress feared the concentrated power of *business organizations* to dominate markets and prices. *It intended to outlaw business monopolies." Defendants are not involved in business, and have no ability to concentrate economic power.*

National Organization for Women v. Scheidler, 968 F.2d at 621, Petition at pp. A-15 to A-16 (emphasis added and footnote omitted).[5]

In phrasing the inquiry incorrectly, petitioners attempt to set up a straw man. Their entire argument, as well as the cases on which they rely, deal with a non-existent is-

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[5]In a curious bit of reasoning, petitioners accuse the court of appeals of "misusing historically unreliable materials [the legislative history] to reach a preordained result." But why would the lower court manipulate history to support a "preordained result" when it is apparent that the court accepted petitioners' allegations and even characterized the respondents' *alleged* conduct as deplorable? Clearly, the court of appeals had no preordained result in mind but was simply convinced by precedent and the Act's legislative history that petitioners' remedies lie under state law, not federal antitrust law.

sue. They completely fail to address the true issue raised by respondents and addressed by both of the courts below. And the law relating to that issue—which holds that the Sherman Act does not apply to a completely non-commercial conspiracy such as the one alleged by petitioners in this case—has never been questioned by this Court or any circuit court of appeals. Thus, the Petition should be denied.

B. Petitioners Also Misstate The Facts, Including Their Own Allegations

In various places in their Petition, petitioners allege that "defendants" operated clinics which competed with the plaintiff clinics. (*See, e.g.*, Petition at pp. 5, 6 and 17.) But the petitioners fail to mention that neither Ryan nor PDAL (nor most of the other defendants) is ever alleged to have participated in any way in those clinics.

Even as to the two or three respondents whom petitioners allege did operate clinics,[6] petitioners radically misstate the facts. For example, they assert that these clinics compete with the plaintiff clinics, but the only clinics they mention in their Complaint are ones operated in Binghampton, New York and Chicago, Illinois (R.236, ¶¶11 and 13). *However, the plaintiff clinics are located in Delaware and Wisconsin* (R.236, ¶¶6 and 7). Further, of course, it is not even suggested that any clinic operated by any respondent provides, or competes in the market for, abortion services.

Similarly, petitioners have alleged a "nation-wide criminal conspiracy of extremists who use unlawful and

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[6]The plaintiffs identify defendants Wojnar and Terry, and possibly Scholberg, as the defendants involved in operating clinics. Petition at pp. 4 and 5. The court of appeals concluded that only Wojnar and Terry are alleged to have operated such clinics. 968 F.2d at pp. 616, 620, Petition at pp. A-4, A-14.

violent means. . ." (Petition at p.3). This conspiracy is alleged to involve "hundreds of thousands of unidentified co-conspirators" (R.469, ¶3, p.3).[7]

Petitioners also consistently rely upon conduct directed at abortion clinics which are not parties to this action. But petitioners never inform the Court that, despite its caption, this suit has never been certified as a class action. Accordingly, most of the petitioners' arguments and "facts" relate not to parties to this suit but to others they have never been authorized to represent.

Similarly, petitioners allege that their "complaint did not in any way implicate lawful speech . . ." (Petition at p.4). This is not true. Petitioners asked the district court to enjoin "the defendants from carrying out a concerted effort to drive women's health centers . . . out of business" (R.236, Count I, Prayer for Relief). Such a "concerted effort," so broadly stated, encompasses picketing, speech, and a host of other protected activities. Further, prosecution of an action based on a complaint of such unprecedented breadth (*e.g.*, a conspiracy of hundreds of thousands) cannot help but have a chilling effect on the First Amendment rights of countless persons.

Petitioners also stretch their own pleadings beyond recognition when they try to paint respondents as commercial actors. As previously discussed, petitioners never alleged that Ryan or PDAL engaged in commerce or had any interest in any commercial entity.[8] Nothing in the Complaint suggests that either Ryan or PDAL had any

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[7]Petitioners' allegation that defendants' conduct was "unlawful" or "illegal" is a red herring, irrelevant to the antitrust issues presented here. *See* page 15 n. 10, *infra*.

[8]The closest plaintiffs come is their assertion that the "business" of PDAL consists of "disrupting and closing clinics" (R.236, ¶18). Obviously, "disrupting and closing clinics" by the methods, and for the purposes, alleged in the Complaint is not a "business."

profit motive for disrupting and closing clinics. In attempting to establish defendants' "economic motive," petitioners point to their RICO Case Statement and a single paragraph in the RICO count of their complaint. But they again seem to forget that *neither Ryan nor PDAL is a RICO defendant*. In any event, petitioners' RICO allegations are largely meaningless even as to those respondents against whom they are asserted. Despite the reckless charges in their Petition that other defendants earned hundreds of thousands of dollars from their pro-life activities, petitioners allege in their pleadings only that certain of the defendant organizations received "donations" (or "income") and paid salaries and benefits to certain of their officers and employees (the individual defendants) (R.236, ¶100 and R.469, pp. 18 and 21-22).

If the receipt of salaries by employees of non-profit organizations or the receipt of donations by those organizations made them commercial entities, there could hardly be such a thing as a non-commercial entity. For example, under plaintiffs' approach, any activity of a charitable organization would be commercially motivated if it provided a reason for donors to make contributions to the organization from which the organization's officers and other employees could be paid. The very fact that petitioners base their position on such tenuous grounds demonstrates their inability to state an antitrust claim.

Petitioners' pleadings, in fact, establish just the opposite of what they argue in their Petition. Their Complaint is replete with allegations demonstrating that the objective of the defendants' pro-life activities was not commercial but to stop abortions. Indeed, the court of appeals recognized that "defendants are not engaged in business." 968 F.2d at 621, Petition at p. A-16. And the plaintiffs do not allege that defendants have conspired to drive all

women's clinics out of business but only *those "which provide abortions."* (*See, e.g.*, R.236, ¶¶1, 18, 32 and 33.)

The district court here noted that "a woman's right to have an abortion is a social or political issue—one of the most complex and contentious in American society today" (Petition at p. B-6). Although these words are not found in the petitioners' Complaint, they jump out from it. For example, petitioners describe NOW as an organization dedicated to protecting the constitutional right of women to reproductive freedom (R.236, ¶5; R.469, p.4) and characterize the defendants as anti-abortion extremists who are intent on depriving American women of those rights (R.236, ¶¶26, 27 and 84-88; R.469, pp. 4 and 5). Indeed, the very vehemence of the petitioner's Complaint, RICO Case Statement and Petition amplifies the accuracy of the district court's statement.

II. The Court Should Deny The Writ Because The Law On the Key Issue Before It Is Well Established—The Antitrust Laws Do Not Apply To A Non-Commercial "Conspiracy" Such As The One Alleged By The Petitioners In This Case

A. Plaintiffs Allege Multiple State Law Torts And Violations Of State And Local Ordinances But No Recognized Violation Of Section 1 Of The Sherman Act

Petitioners' Complaint in this action is devoid of typical antitrust allegations. Indeed, petitioners allege none of the types of activities traditionally thought to violate the Sherman Act. *Nowhere do they allege that the defendants engaged in price fixing, a boycott or other concerted refusal to deal, a territorial restraint or any other type of conduct "normally held violative of the Sherman Act." See Eastern Railroad Presidents Conference v.*

Noerr Motor Freight, Inc., 365 U.S. 127, 136-37, *reh'g. denied*, 365 U.S. 875 (1961).

Indeed, that petitioners have not alleged an antitrust claim at all is apparent from a comparison of their allegations to circumstances in which the Sherman Act was intended to apply. In a typical case alleging violations of Section 1 of the Sherman Act, such as price fixing, it is sellers of a commodity or service who conspire. Here, the persons who are alleged to have conspired are third parties who have no economic relationship to the plaintiffs. In a typical Section 1 case, the conspirators receive some economic benefit from their conspiracy, such as higher prices. Here, the defendants receive no economic benefit from the increased prices plaintiffs allege resulted from the conspiracy. It is the plaintiffs, not the defendants, who benefit from those higher prices. In a typical Section 1 case, the conspiracy results in increased *prices*. In this case, the conspiracy is alleged to have resulted in increased *costs* which had only an indirect effect on prices. In the usual Section 1 case, the defendants are alleged to restrict supply. Here they are alleged to restrict demand. In the normal Section 1 case, the conspiracy is alleged to restrict the terms on which consumers can buy commodities or services. Here, the plaintiffs allege that consumers are discouraged from buying them at all. In the usual Section 1 case, the defendants seek to increase their share of the market. In this case, the defendants have no share of the market, do not wish to gain one, and, in fact, are alleged to be attempting to destroy the entire market for abortion services.

The fact of the matter is that the plaintiffs have not alleged an antitrust conspiracy. Rather, they allege state-law tort and criminal violations such as trespass, vandalism, destruction of property and interference with business relationships (Petition at p.3 n.1) which "bear very little if any resemblance to the combinations normally held vi-

olative of the Sherman Act. . . ." *Noerr*, 365 U.S. at 136-37.[9] In fact, as the district court found, the "essential dissimilarity' between the alleged conduct and the conduct traditionally regulated by antitrust laws is of a greater magnitude in this case than that in *Noerr* itself." 765 F.Supp. at 941, Petition at p. B-8. As stated by the court of appeals: "[I]t is hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction." 968 F.2d at 621, Petition at p. A-16 to A-17 (quoting *Havoco of America Ltd. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980)).

But federal antitrust law is not to be used to remedy, or "federalize," state law torts or crimes, no matter how pervasive they might be. As this Court has stated:

> The Sherman Act was *not enacted . . . to afford a remedy for wrongs, which are actionable under state law*, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 511 (1939) (emphasis added) (quoting *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 471 (1921)). As the Court of Appeals for the Seventh Circuit has stated:

> The legislators who passed the Sherman Act did not make ordinary business torts federal torts for which treble damages could be recovered; no such wholesale displacement of state tort law into the federal courts was contemplated or desired. . . .

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[9] At page 4 of their Petition, petitioners argue that their Complaint "attacked only the independently illegal and tortious conduct of the extremists. . . ." In other words, state law torts and crimes.

Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 654 (7th Cir. 1984). *See also Seglin v. Esau*, 769 F.2d 1274, 1280 n.6 (7th Cir. 1985), and *Franklin Music Company v. American Broadcasting Companies, Inc.*, 616 F.2d 528, 556 (3d Cir. 1979) (Sloviter, Circuit Judge, concurring) ("For example, if two disgruntled customers conspire to burn a department store which would, if accomplished, have the effect of destroying its business, it seems improbable that a court would hold that the intent which suffices to support a claim under state tort law is itself also enough to support a claim for violation of Section 1 of the Sherman Act"). In this case, petitioners ask the Court to turn state misdemeanors and violations of city ordinances (*e.g.*, trespassing) into violations of federal law with treble damage penalties.[10]

B. The Legislative History Of The Sherman Act, As Well As Every Supreme Court And Court Of Appeals Decision On Point, Recognize That The Antitrust Laws Do Not Apply In A Non-Commercial Case Such As This

Even before the Sherman Act was passed, it was clear that it would not apply to non-business combinations. During debate on the Act, Senator Sherman pointed out

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[10]Petitioners repeatedly allege that respondents' activities were "unlawful" and "illegal." This is a red herring. If they are referring to violations of the antitrust laws, they are begging the question. But if, as is apparent, they are referring to acts which are otherwise unlawful, such as trespass and vandalism, their allegations are simply irrelevant. *See Apex Hosiery*, 310 U.S. 469, 513 (the Sherman Act "draws no distinction between the restraints effected by violence and those achieved by peaceful ... means"); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) ("[i]t is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful"); and *Sitkin Smelting & Refining Co. v. FMC Corporation*, 575 F.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978) (conduct not within the scope of the Sherman Act does not become an antitrust violation merely because it is illegal).

that it was meant to apply only to "business combinations," not "voluntary associations." *Parker v. Brown*, 317 U.S. 341, 351 (1943) (citing 21 Cong.Rec. 2562 (1890)). As the Eighth Circuit noted in *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1309 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) ("*Missouri v. NOW*"), the legislative history of the Act indicates that "it was the competitors in commerce that Senator Sherman had in mind as the concern of his bill" and the Supreme Court has determined that "activities that were meant to be covered are competitive activities by competitors with some self-enhancement motivation. . . ." The court perceived Congress' concern "to be not the elimination of boycotts, but elimination of boycotts used by a competitor against a competitor (or against a supplier, customer, etc.) in the business of competing." *Id.* at 1310.

Indeed, the law is so well settled that there have been very few attempts to apply the antitrust laws to totally non-commercial conspiracies such as the one alleged here. And, even in basically non-commercial cases which (unlike this one) involved some commercial elements, the courts have consistently rejected the application of the antitrust laws.

This Court, for example, has repeatedly affirmed the principle that the Sherman Act does not apply to business combinations with *non-commercial objectives*. *See, e.g., Noerr*, 365 U.S. at 141 (the Sherman Act is "tailored . . . for the business world"); and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) (the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives").

Of course, many other courts have reached the same conclusion. *See, e.g., Marjorie Webster Junior College,*

Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650, 654-55 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (non-commercial activities of non-profit college accreditation association were outside the scope of the Sherman Act); *Swan v. First Church of Christ, Scientist*, 225 F.2d 745, 751 (9th Cir. 1955) (church authorities' efforts to hinder publication and dissemination of book among its members bears no resemblance to "trade or commerce" under the Sherman Act); *Proctor v. General Conference of Seventh-Day Adventists*, 651 F.Supp. 1505, 1524 (N.D. Ill. 1986) (Sherman Act not applicable to Seventh-Day Adventist Church which was "not involved in 'trade or commerce' in the sense those terms are ordinarily used in commercial profit-making activity"); and *Barr v. National Right to Life Committee*, 1981-2 Trade Cases ¶64,315 (M.D. Fla. 1981).[11]

In other cases, the courts have found that the antitrust laws do not apply to alleged conspiracies with non-commercial objectives even where the defendants were business entities. For example, in *Allied International, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982), the longshoremen conspired to refuse to load and unload ships engaged in trade with the Soviet Union. Even though the court concluded that the labor law exemption

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[11]The *Barr* court granted a motion to dismiss a complaint alleging a conspiracy of religious organizations, an anti-abortion group, hospitals and physicians aimed at curtailing a physician's ability to provide full abortion services to patients. The court said:

> Because defendants' actions, the purpose of which was to encumber plaintiff's ability to provide full abortion services in the Orlando area, are *inherently non-commercial and prompted by no anti-competitive purpose*, they too do not fall within the reach of the Sherman Act.

Barr, 1981-2 Trade Cases at p. 74,410 (emphasis added).

to the antitrust laws was not available to the defendants, it held that the antitrust laws did not apply to the defendants' actions, which were motivated by non-commercial objectives. *Id.* at 1381. The court said:

> We think this limited refusal to handle goods, undertaken as a political protest by a labor union acting on its own, *and ill-designed as a means of gaining a competitive or commercial advantage for the union or its members,* is not the sort of evil at which the Sherman Act is aimed. The Sherman Act was a product of "the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery v. Leader*, 310 U.S. 469, 492-93 . . . (1940). *The Supreme Court has said that "the Act is aimed primarily at combinations having commercial objectives* and is applied only to a limited extent to organizations, like labor unions, which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra*, 359 U.S. at 213 n.7.

Id. at 1380-81 (emphasis added).[12]

Courts have similarly held the Sherman Act not to apply in cases involving *non-commercial conduct*. For example, in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), this Court held that the Sherman Act did not apply to employees engaged in a violent sit-down strike in which numerous state law felonies were committed and

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[12] *See also, Council for Employment and Economic Energy Use v. WHDH Corp.*, 580 F.2d 9, 12 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) (upholding dismissal of a complaint and noting that "the original intent of Congress in enacting the Sherman Act was to suppress and penalize restraints on *commercial competition* in the marketing of goods and services") (emphasis in original).

which shut down a company which produced a large percentage of the nation's hosiery. And, in *Barr*, 1981-2 Trade Cases at p.74,410, the court found the pro-life defendants' conduct to be "inherently non-commercial."

Thus, as the cases discussed above demonstrate, the courts have held the Sherman Act not to apply where the *defendants* were non-commercial, where the defendants had no commercial *relationship* with the plaintiffs, where the defendants' *motivation* was non-commercial, and where the defendants' *conduct* was non-commercial. In this case, the defendants fall into all of these categories.

C. The Cases Relied Upon By Petitioners Do Not Support The Applicability Of The Antitrust Laws In This Case

The petitioners direct their entire antitrust argument at their own straw man (their purported "social cause" or "good motives" exemption to the Sherman Act). They thus fail to discuss whether the antitrust laws apply to a totally non-commercial conspiracy such as is alleged in this case. The reason is clear: the antitrust laws do not apply. And none of the Supreme Court or court of appeals cases cited by petitioners hold to the contrary.

Petitioners rely, for example, on two Supreme Court decisions, *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) and *F.T.C. v. Superior Court Trial Lawyers Ass'n* ("*D.C. Lawyers*"), 493 U.S. 411 (1990), both of which involved commercial activities. In *Allied Tube*, manufacturers of steel electrical tubing packed a trade association meeting so that the association would not approve the use of plastic electrical tubing as a substitute for their product. The Court recognized that "*the antitrust laws should not regulate political activities simply because those activities have a commercial impact*" but found that the conduct at issue in that case could "*more aptly be*

characterized as commercial activity with a political impact." *Allied Tube*, 486 U.S. at 507 (emphasis added).

D.C. Lawyers also involved commercial activity—a conspiracy among lawyers to fix (raise) the price of their services which nearly brought the District of Columbia criminal justice system to a halt until the lawyers received the higher compensation they demanded. The Supreme Court understandably characterized this as "a naked restraint of price and output in violation of the antitrust laws." *D.C. Lawyers*, 493 U.S. at 423.[13]

Petitioners' reliance on *National Society of Professional Engineers v. United States*, 435 U.S. 679, 693 (1978) is also unfounded. In that case, the Court explicitly found that the defendant, which was comprised of competing engineers, had an anticompetitive purpose and therefore found their commercial conduct (prohibition of competitive bidding) to be violative of the antitrust laws. And *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984), involved an agreement among competitors (dentists) to exclude (boycott) a competitor (another dentist) from full membership in their association. Thus, again, commercial competitors used an economic tool to achieve their purposes.

Likewise, petitioners' reliance on other cases involving organizations (even not-for-profit organizations) which were comprised of commercial actors only highlights the many commercial aspects present in those cases, but missing here. *See, e.g., National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85 (1984) (NCAA

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[13]The *D.C. Lawyers* Court distinguished *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, *reh'g denied*, 459 U.S. 898 (1982), noting that *Claiborne* "is not applicable to a boycott conducted by *business competitors* who '*stand to profit financially*'" and that the *Claiborne* boycotters sought "no special advantage for themselves." *D.C. Lawyers*, 439 U.S. at 427 (emphasis added).

restricted the televising of college football games of its member Universities); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975) (state bar minimum fee schedule prevented price competition among attorneys); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (organization of dentists which required its members to withhold x-rays from dental insurers in connection with evaluating patients' claims for benefits prevented competition among dentists with respect to insurance policies); *Wilk v. American Medical Association*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1260 (1984) (defendant association of medical doctors implemented a group boycott against chiropractors).

Petitioners also rely upon *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981). But the *Rotelle* court noted in the very first sentence of its opinion that the case "involve[d] a dispute between lay and clerical members of the Roman Catholic Church, *who also share a commercial relationship*," *Id.* at 1038 (emphasis added), and determined that the church had a "financial interest" in the transactions at issue. *Id.* at 1047. In any event, contrary to plaintiffs' suggestion, the *Rotelle* court, which discussed the antitrust laws only in *dicta*, never ruled that the defendants' conduct was subject to antitrust regulation. *Id.* at 1048.

Petitioners attempt to distinguish *Missouri v. NOW* by relying on dicta in a footnote in that case which states, gratuitously and only for the sake of illustration, that "[t]he Sherman Act *may* apply *in some situations* to noncommercial and non-economic boycotts." *Missouri v. NOW*, 620 F.2d at 1315 n.16 (emphasis added) (Petition at p.19). However, the court explicitly acknowledged that "[o]ther courts have been more generous and have equated noncommercial activities with a political right to petition the government." *Id.* It concluded that it was

"not necessary, under the facts of our case, for our ruling to be so broad." *Id.* Furthermore, the court did not state that it *would* apply the Sherman Act to such a boycott and the entirety of its opinion clearly suggests that it would not.

Finally, the old Eighth Circuit case of *Council on Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920), on which petitioners rely in order to create an alleged conflict between the circuits, gains petitioners nothing. That case involved commercial means (a boycott) employed by persons who were commercially related (as purchasers of magazines) to the "victims" of the boycott (the publishers of the magazines). None of those factors is present here.

In short, none of the Supreme Court or court of appeals cases on which plaintiffs rely found the antitrust laws to apply to a totally non-commercial case such as this one, in which non-profit defendants with no business relationship with plaintiffs engaged in non-commercial activities for non-business purposes using no economic tool to achieve their ends.

In fact, of the many cases cited in petitioners' brief, only one district court decision, *Northeast Women's Center, Inc. v. McMonagle*, 624 F.Supp. 736 (E.D. Pa. 1985), even arguably supports their position. But that decision is contrary to every other case on point and is simply wrong.

As they did in the court below, petitioners fail to mention the subsequent history of the *McMonagle* case or inform the Court that the *McMonagle* court subsequently expressed significant reservations about its own decision. In *Northeast Women's Center, Inc. v. McMonagle*, 670 F.Supp. 1300 (E.D. Pa. 1987), *aff'd in part, rev'd in part*, 868 F.2d 1342 (3d Cir. 1989), that court directed a verdict against the plaintiff abortion clinic on the antitrust issue.

Its comments about its earlier decision (the decision on which petitioners in this case rely) are instructive. It said:

> *The plaintiff in this case sought to make new law,* pursuing an antitrust recovery *through an unorthodox application of the Sherman Antitrust Act. Due to the apparent complexity of the facts and the imprecision in the complaint, the court allowed the plaintiff the benefit of the doubt* and permitted the Center to proceed with its proof. However, the mere fact that the plaintiff attempts a novel approach does not afford it special treatment under the antitrust laws.

Id. at 1305 (emphasis added).

Both the district court and the court of appeals in this case avoided the same error by refusing to expand the antitrust laws in such a "new" and "unorthodox" way. In fact, the *McMonagle* court's comments suggest that, were it to decide the case over again, it would do the same, dismissing the case at the start rather than directing a verdict at the end of the plaintiff's case.

D. NOW Itself Has Recognized That This Sort Of Attempt To Expand The Antitrust Law Does Not Merit This Court's Attention

Although petitioners now urge this Court to issue a writ of certiorari, when the shoe was on the other foot NOW recognized that the granting of certiorari in such a case would be improvident.

In *Missouri v. NOW*, the State of Missouri sued NOW, claiming that it had conspired with other organizations to boycott convention facilities in states which refused to approve the Equal Rights Amendment. Both the district court and the court of appeals held that the antitrust laws did not apply. Missouri petitioned for cer-

tiorari and NOW opposed that petition, arguing that the antitrust laws were not intended to be applied to "noncommercial organizations" such as NOW and its co-conspirators, none of which "[sought] any economic gain" and none of which "were . . . in competition" with the plaintiff. NOW said:

> . . . So far as we are aware, Missouri's lawsuit [and two related cases] . . . represent the first and it is hoped the last time in the 90-year history of the Sherman Act that anyone has attempted to use that law as a tool to thwart the concerted political activities of civil rights groups. If similar lawsuits are attempted in the future, the lower courts are likely to recognize them for what they are and dispose of them without the need for any further guidance of this Court.

NOW's Brief in Opposition to Certiorari at p.5.

The Seventh Circuit and the district court here did exactly what NOW predicted. They each recognized a baseless attempt to expand the antitrust laws for what it was and disposed of it.

In fact, NOW recognized in the *Missouri v. NOW* case that this Court has repeatedly construed the Sherman Act to apply only to "commercial activities," "competitive business enterprises," "business competition," "combinations of business and capital organized to suppress commercial competition," "concerted refusals by traders to deal with other traders" and "combinations having commercial objectives" (NOW's Brief in Opposition to Certiorari at p.7). Indeed, the "fundamental error" of Missouri in that case, NOW argued (NOW's Brief in Opposition to Certiorari at p.11), was:

> its attempt to apply the commercial rules of the free market system to the political arena. In the com-

> mercial marketplace, concerted action among businesses is suspect in view of the free enterprise goals of the antitrust laws. Individual businesses are supposed to compete, not collaborate. In the political arena, the opposite attitude prevails.

NOW's arguments in *Missouri v. NOW* are well taken and this Court denied certiorari in that case. The law has not changed since NOW was on the other side of the question. Certiorari was not granted when NOW opposed it in that case and it should not be granted when NOW petitions for it in this case.

E. The Expansion Of The Sherman Act Urged By Petitioners Would Have Absurd Results

As mentioned above (pp. 19-20), petitioners argue that all that is required for an antitrust violation is a conspiracy and economic *impact* (which, of course, is included in the requirement of Section 4 of the Clayton Act (15 U.S.C. §15) that there be an "injury to business or property" in any event). But this Court has already rejected that argument. As it stated in *Allied Tube*: "*[T]he antitrust laws should not regulate political activities simply because those activities have a commercial impact*." 486 U.S. at 507 (emphasis added).

In any event, such a rule would have absurd results. Under that rule, the antitrust laws would apply to the NAACP, Operation PUSH, NOW, migrant farmers and numerous churches, colleges, universities and other organizations and individuals which have been involved in boycotts of such products as cosmetics, television stations, Florida citrus products, lettuce, grapes, slacks, textiles and Russian vodka, as well as to cases in which institutions have agreed to sell their investments in companies doing business in South Africa or individuals have agreed not to patronize convenience stores which sell pornography.

In fact, whereas the present case involves non-commercial defendants with no commercial relationship with plaintiffs who used non-commercial means to accomplish their non-commercial objectives, in these other situations the parties (which were generally related as customers, investors, purchasers, etc.) engaged in economic boycotts and other concerted economic activities to accomplish their desired results. *See, e.g., Missouri v. NOW*, 620 F.2d at 1302 (antitrust laws not applicable to NOW's boycott of state convention facilities even though it was "economically tooled"). Indeed, petitioners themselves appear to recognize that the logical consequence of their novel argument would be to force the federal courts to deal with a host of non-traditional antitrust cases involving groups such as Earth First! and those organizations listed above including, paradoxically, NOW itself.

Petitioners also fail to address other consequences of their position. Focusing on their "good motives" and "social purposes" straw men, the petitioners purport to be concerned about turning federal trials into circuses. But their suggested expansion of the antitrust laws to cover completely non-commercial events would transform every federal district court into a pan-state tribunal by federalizing the tort and criminal laws of all 50 states and the ordinances of thousands of cities, towns, counties and villages. In addition to requiring each federal court to devote its scarce resources to issues of state and local law, petitioners (who have alleged a conspiracy involving hundreds of thousands of co-conspirators) demand an approach which would also expand exponentially the number of potential federal defendants.

Petitioners' approach is thus both unsupported by the law and unworkable in practice. The Court should deny their Petition.

III. The Court Should Deny The Petition Because, Even If The Antitrust Laws Applied To This Case, Petitioners Do Not Allege Any Antitrust Injury

As this Court held in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), an antitrust plaintiff "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* at 489 (emphasis in original). This standard must be met even by plaintiffs, such as those in this case, who seek injunctive relief under Section 16 of the Clayton Act. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

Antitrust injury is injury to competition. It is well established that "[t]he the antitrust laws ... were enacted for 'the protection of *competition, not competitors*.'" *Brunswick*, 429 U.S. at 488 (emphasis in original). Since petitioners have not alleged a *per se* violation,[14] it is also well established that the injury to competition must be *significant*; a plaintiff can only prevail if it can show that an alleged combination or conspiracy "results in a substantial foreclosure of competition in ... a relevant market." *Seglin v. Esau*, 769 F.2d 1274, 1282 n.9 (7th Cir. 1985); *see also, Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961); *Phil Tolkan Datsun, Inc. v. Greater Milw. Datsun Dealer's Advertising Ass'n*, 672 F.2d 1280, 1289 (7th Cir. 1982) (plaintiff "failed to identify any *clear or significant* anticompetitive effects" (emphasis added)).

In this case, petitioners have not even alleged the existence of relevant geographic or product markets, much

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[14]It goes without saying that, if petitioners even come close to alleging any violation of the Sherman Act, it would not be a *per se* violation. The *per se* rule "is not employed until after considerable experience with the type of challenged restraint." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19 n.33 (1979).

less the substantial foreclosure of competition in such markets. Nowhere in their Complaint do petitioners allege that the number of abortion providers in any geographic area has been reduced or even that fewer abortions are being performed in any such area.

In any event, the first thing a plaintiff must do to show injury to competition in a rule of reason case is establish that the defendants had significant market power. But petitioners here have not alleged that the defendants possessed such market power.

In *Sutliff, Inc.*, 727 F.2d at 655, the court affirmed the dismissal of a complaint noting that it alleged only the crippling or destruction of *competitors* in the market: "The complaint alleges no competitive injury in the antitrust sense; defines no market; refers to no market-wide anticompetitive effects, actual or probable." The same is true in this case.[15]

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[15] *See also Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280, 1288 (7th Cir. 1982):

> plaintiff's allegations in the instant case, even fortified by all reasonable inferences that can be drawn from them, do not establish the sort of anticompetitive injury that the antitrust laws are designed to remedy. As this court recently stated:
>
> > It is not the unfair means which may have been employed by the defendant that fall within the purview of the Sherman Act. Rather, the *sole question is whether those means lessened competition*. As noted above, unfair competition is still competition, and will be actionable under the antitrust laws generally *only where a defendant with substantial market power* uses the unfair means to increase its share of the market by eliminating a competitor, thereby creating the risk of monopoly.
>
> *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980).

Id. at 1288 (emphasis added). *See also Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1334-35, *reh'g denied, en banc*, 788 F.2d 1223 (7th Cir. 1986); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

Petitioners try to avoid the market power issue (as well as most other issues relating to their insufficient allegations), by arguing that economic impact *by itself* is sufficient to establish an antitrust violation. But, as discussed above (*see* pp. 19-20 and 25, *supra*), this Court has already rejected that argument. Indeed, a contrary ruling would transform virtually all joint conduct which has some economic impact into a violation of the antitrust laws. But that is simply not a reasonable interpretation of those laws or this Court's holdings.

Because petitioners do not even come close to alleging antitrust injury, the decisions of the lower courts were correct and this Court should deny their Petition.

CONCLUSION

For all of the foregoing reasons, respondents John P. Ryan and Pro-Life Direct Action League, Inc. respectfully ask the Court to deny the Petition for Writ of Certiorari, at least insofar as it relates to the petitioners' antitrust claims.

Respectfully submitted,

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December 23, 1992